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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

PUBLIC COPY

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: SEP 15 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a law firm. It seeks to employ the beneficiary permanently in the United States as a foreign law consultant. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.[1]

As set forth in the director's December 10, 2008 denial, the single issue in this case is whether the petitioner has had the continuing ability to pay the proffered wage from the priority date onward.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act) provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.[2] If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."[3]

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] The beneficiary's educational credentials are not at issue in this case. The labor certification requires a Master's degree in Comparative Law. The beneficiary has a 2006 U.S. Master's degree in International and Comparative Law from Chicago-Kent College of Law and a Chinese Bachelor of Laws degree from Sichuan Normal University.

[3] The regulation at 8 C.F.R. § 204.5(K)(3)(ii) provides that any three of the following may be

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on March 18, 2008, which establishes the priority date. The proffered wage as stated on the ETA Form 9089 is $19.99 per hour ($41,579.20 per year based on a 40-hour work week).

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accepted as evidence of exceptional ability;

(1) Degree relating to area of exceptional ability;
(2) Letter from current or former employer showing at least 10 years experience;
(3) License to practice profession;
(4) Person has commanded a salary or remuneration demonstrating exceptional ability;
(5) Membership in professional association;
(6) Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization.

Comparable evidence may be submitted if above categories are inapplicable. This evidence may include expert opinion letters.

These criteria serve as guidelines, but evidence that a beneficiary may meet three of these criteria is not dispositive of whether the beneficiary is an alien of exceptional ability. It must also be established that the beneficiary possesses a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business. This has not been asserted in this case and the AAO finds no evidence in the record that the beneficiary would qualify for a classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a "degree of expertise significantly above that ordinarily encountered." In this case, the petitioner has not asserted that the beneficiary falls within this category.

In support of the petitioner's ability to pay the proffered wage, the petitioner has provided financial documentation to the underlying record, on appeal and in response to the AAO's June 14, 2011, request for evidence. This evidence includes copies of unaudited financial statements covering 2004, 2005, 2006 and 2007; copies of the petitioner's Form 1065, U.S. Partnership Income for 2007, 2008, 2009 and 2010; copies of the beneficiary's Wage and Tax Statements (W-2s) issued by the petitioner for 2007, 2008, 2009, and 2010, and copies of another beneficiary's financial documentation for whom the petitioner had sponsored with the initials of "XQ."[4]

As noted above, the record indicates the petitioner is structured as a general partnership and files its tax returns on IRS Form 1065. On the petition, the petitioner claims to have been established in 1992 and to currently employ seventeen workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on May 28, 2008, the beneficiary claims to have worked for the petitioner since February 15, 2007.

The beneficiary's W-2s reflect that the petitioner paid the beneficiary the following amounts as wages:

Year	Wages	Difference from the Proffered Wage of $41,579.20
2007	$7,833	$33,746.20 Less
2008	$33,017.42	$ 8,461.78 Less
2009	$35,492.48	$ 5,986.72 Less
2010	$1,380.71[5]	$40,098.49 Less

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains

[4] This individual was the beneficiary of a Form I-129 nonimmigrant petition. As she gained permanent resident status in 2006, the petitioner's ability to pay the proffered wage to the instant beneficiary beginning at the March 18, 2008, priority date would not be affected. It is unclear why the petitioner did not provide information relevant to an individual with the initials "CYC," receipt number WAC08xxx50840, who was sponsored on a Form I-140, Immigrant Petition for Alien Worker, which was approved on August 7, 2008. CYC gained permanent resident status on December 11, 2008.

[5] The petitioner appears to have employed the beneficiary very little in 2010, however there is no indication in the petitioner's August 4, 2011 response to the AAO's request for evidence that the job offer to the beneficiary has been terminated. It is noted that the regulation at 20 C.F.R. § 656.3(1) defines in pertinent part that " 'employment' means permanent, full-time work by an employee for an employer other than oneself."

lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Relevant to the financial statements submitted by the petitioner, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that the petitioner submitted to the record are not persuasive evidence. They are based on the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedule K has relevant entries for additional income and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K for its income tax returns submitted for 2008,[6] 2009, and 2010. For these years, the petitioner's tax returns reflected the following information:

Year	2008	2009	2010
Net Income	$1,121,228	$856,517	$1,083,702
Current Assets	$ 777,488	$732,312	$ 880,980
Current Liabilities	$ 87,062	$ 87,623	$ 231,682
Net Current Assets	$ 690,426	$644,689	$ 649,298

As set forth above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[7] It represents a

[6] The petitioner provided its 2007 federal tax return, which showed $520,583 in net income and $407,624 in net current assets. This information, however, is less probative of the petitioner's ability to pay the proffered wage because it is prior to the priority date of March 18, 2008.

[7] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within

measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the partnership's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 15 through 17 of Schedule L. If a partnership's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.[8]

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Wages paid that are less than the proffered wage are also considered. If either the petitioner's net income or net current assets can cover the difference between the actual wages paid and the proffered wage, then the petitioner's ability to pay the full proffered salary has been demonstrated for that period of time. In the instant case, as set forth above, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. In 2008, the year of the priority date, it paid the beneficiary $8,461.78 less than the proffered wage. In 2009 it paid the beneficiary $5,986.72 less than the proffered wage, and in 2010, it paid the beneficiary $40,098.49 less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[8] A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

In this case, in 2008, 2009 and 2010, the petitioner's net income of $1,121,228, $856,517, and $1,083,702, respectively, far exceeded the difference between the actual wages paid to the beneficiary and the full proffered wage of $41,479.20 in each of these years. Thus, as net income could cover the individual shortfalls of ($8,461.78), ($5,986.72), and ($40,098.49), respectively, between the proffered wage and the actual wages paid to the beneficiary, the petitioner has established that it has had the continuing financial ability to pay the proffered wage of $41,479.20 from the priority date onward.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.